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DATUK M KAYVEAS & ANOR

v.

BAR COUNCIL

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ZAINUN ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-2329-2009]

C

12 DECEMBER 2011

LEGAL PROFESSION: *Solicitors - Stakeholders - Sale and Purchase Agreement - Monies held by appellants as stakeholders released to unauthorised person - Whether appellants duty bound to hold monies as*

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trustees for both vendor and purchaser - Whether resulted in breach of fiduciary duty - Whether act constituted professional misconduct

The complaint against the appellants (advocates and solicitors), who were partners in a legal firm, arose out of a sale and purchase agreement ('SPA') of a piece of land ('the property') executed between their client ('the vendor') and the purchaser. *Vide* letter dated 29 October 1996, the purchaser's solicitors forwarded the differential sum, which formed part of the balance purchase price to the appellants as stakeholders. The purchaser's solicitors then forwarded further sums to cover the shortfall in the redemption sum and for the discharge of charge. However, eventually, the purchaser's solicitors had to attend to the discharge of charge and as such, the appellant had to release all amounts held by them as stakeholders to the purchaser's solicitors. At this juncture, there was an unaccounted sum of RM195,199.94 which was not released to the purchaser's solicitors. Upon enquiry, the appellants informed that they had released the said sum to one Ahmad Naslizan who was not the vendor. Based on the complaint filed against the appellants, the Disciplinary Committee ('DC') of the respondent held that the appellants were in breach of their duties as stakeholders for monies held by them and that the breach constituted conduct unbefitting of advocates and solicitors pursuant to s. 94(3)(o) of the Legal Profession Act 1976 and a fine was thus imposed on each appellant. On appeal, the High Court dismissed the appellant's appeal against the DC's decision. Dissatisfied with the said decision, the appellants appealed to this court.

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Held (dismissing appeal with no order as to costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The appellants were duty bound to hold the monies as trustees for both the vendor and the purchaser to await the outcome of the event, *ie*, the payment towards the redemption sum and the discharge of charge for the property. Pending the outcome of that event, the appellants as stakeholders might not part with the monies without the consent of both the vendor and the purchaser. Further, the relationship between the appellants, the vendor and the purchaser was fiduciary in nature, which existed between trustees and beneficiaries. (paras 16 & 20)

(2) There was a breach of fiduciary duty. The appellants were required to utilise part of the sum for redemption purposes and thereafter to release the balance, if any, to the vendor and not to any unauthorised person. The appellants' conduct in releasing the sum of RM195,199.94 to Ahmad Naslizan was clearly in breach of the express terms of the stakeholding contained in cl. 2(1) and cl. 2(4) of the SPA which constituted professional misconduct (*Au Kong Weng v. Bar Committee, Pahang*; refd). (paras 16 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Aduan terhadap perayu-perayu (peguambela dan peguamcara), yang merupakan rakan kongsi sebuah firma guaman, berbangkit daripada perjanjian jual beli ('PJB') sebidang tanah ('hartanah') yang disempurnakan antara anak guamnya ('penjual') dan pembeli. Melalui surat bertarikh 29 Oktober 1996, peguamcara pembeli telah menyerahkan jumlah penebusan yang merupakan sebahagian daripada baki harga jualan kepada perayu-perayu sebagai pemegang amanah. Peguamcara pembeli kemudiannya menyerahkan jumlah lanjutan untuk menjelaskan baki wang penebusan dan pelepasan gadaian. Walau bagaimanapun, akhirnya, peguamcara pembeli terpaksa menguruskan pelepasan gadaian dan dengan itu, perayu-perayu perlu melepaskan kesemua amaun yang dipegang sebagai pemegang amanah kepada peguamcara pembeli. Pada masa itu, terdapat jumlah yang tidak diambil kira sebanyak RM195,199.94 yang tidak dilepaskan kepada peguamcara pembeli. Atas pertanyaan, pihak perayu memaklumkan bahawa mereka telah

A melepaskan jumlah tersebut kepada seorang yang bernama Ahmad Naslizan yang bukannya seorang penjual. Berdasarkan aduan yang difailkan terhadap perayu-perayu, Lembaga Tatatertib ('LT') responden memutuskan bahawa perayu-perayu telah memungkiri tanggungjawab mereka sebagai pemegang amanah terhadap wang
B yang dipegang oleh mereka dan kemungkiran tersebut membentuk suatu kelakuan yang tidak wajar oleh seorang peguambela dan peguamcara menurut s. 94(3)(o) Akta Profesion Undang-Undang 1976 dan oleh itu, setiap perayu dikenakan denda. Atas rayuan, Mahkamah Tinggi menolak rayuan pihak perayu terhadap
C keputusan LT. Tidak berpuas hati dengan keputusan tersebut, perayu merayu ke mahkamah ini.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman
D **mahkamah:**

(1) Perayu-perayu terikat dengan tanggungjawab mereka untuk memegang wang sebagai pemegang amanah bagi kedua-dua penjual dan pembeli sementara menunggu perkara tersebut selesai, iaitu, bayaran terhadap wang tebusan dan pelepasan
E gadaian hartanah. Sementara itu, perayu-perayu sebagai pemegang amanah tidak boleh melepaskan wang tanpa persetujuan kedua-dua penjual dan pembeli. Tambahan, hubungan antara pihak perayu, penjual dan pembeli bersifat fidusiari, yang wujud antara pemegang amanah dan benefisiari.
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(2) Terdapat kemungkiran kewajipan fidusiari. Perayu-perayu sepatutnya menggunakan sebahagian wang tersebut bagi tujuan penebusan dan selepas itu untuk melepaskan baki, jika ada, kepada penjual dan bukannya kepada seseorang yang tidak
G diberikan kuasa. Tindakan perayu dalam melepaskan jumlah RM195,199.94 kepada Ahmad Naslizan jelas merupakan suatu kemungkiran terma-terma pegang amanah yang terkandung dalam kl. 2(1) dan kl. 2(4) PJB yang membentuk salah laku profesional (*Au Kong Weng v. Bar Committee, Pahang*; dirujuk).
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Case(s) referred to:
Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 FC ***(refd)***
Dato Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801 HC ***(refd)***
Gana Muthusamy v. Tetuan Lim Ong & Co [1998] 2 CLJ 945 HC ***(refd)***
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Keith Sellar v. Lee Kwang And Tennakoon v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***
Loh Chow Tet v. Kok Bun Kau [2012] MLJU 191 CA ***(refd)***
OCBC Bank (Malaysia) Bhd v. Lee Lee Fah & Ors & Another Appeal [2000] 1 CLJ 71 CA ***(refd)***
Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah [2009] 1 CLJ 872 FC ***(refd)***
Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 94(3)(o)

For the 1st appellant - Datuk M Kayveas; M/s Blanche Kayveas & Co
For the 2nd appellant - Absent
For the respondent - Rabindra S Nathan; M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R-17b-12-2005]

Reported by Kumitha Abd Majid

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] Appellants No. 1 and No. 2, Datuk M Kayveas and Datin Blanche O'Leary, are partners of Blanche Kayveas & Co, ("advocates and solicitors"). The disciplinary committee ("DC") of the respondent ("Bar Council") held that the advocates and solicitors were in breach of their duties as stakeholders of monies held by them, and that the breach constituted conduct unbefitting of advocates and solicitors, pursuant to s. 94(3)(o) of the Legal Profession Act 1976 ("s. 94(3)(o)"). The DC imposed a fine of RM5,000 on each appellant ("the DC's decision"). (A reference hereinafter to a section is a reference to that section in the Legal Profession Act 1976).

[2] The Kuala Lumpur High Court dismissed the appellants' appeal against the DC's decision.

[3] On 12 December 2011, we dismissed the appellants' appeal herein and affirmed the decision of the High Court. Our grounds are set out below.

A **Factual Background**

[4] The factual background is uncontroverted. It started with the complaint against the appellants. It arose out of the Sale and Purchase Agreement ("SPA") executed between Jordone
B Corporation Sdn Bhd ("the purchaser") and Avacado Corporation Sdn Bhd ("the vendor"). (A reference hereinafter to a clause is a reference to that clause in the SPA). The subject matter of the SPA is a piece of land held under Geran Mukim 452, Lot 1910, Mukim of Cheras, District of Ulu Langat ("the property"). The
C agreed price was RM2,048,000.60.

[5] The appellants were the vendor's solicitors ("vendor's solicitors"). The purchaser's solicitors were Messrs Faeizah Kerk Bong & Associates ("purchaser's solicitors").

D **[6]** To complete the purchase, the purchaser obtained a loan of RM1,222,000 from Bank Bumiputera. There was a differential sum of RM621,200.54, computed as follows:

Purchase price	RM2,048,000.60
E – Deposit	(RM204,800.06)
– Loan Sum	(RM1,222,000)
= Differential Sum	RM621,200.54

F **[7]** *Vide* letter dated 29 October 1996, the purchaser's solicitors forwarded the differential sum to the appellants as stakeholders. The differential sum formed part of the balance purchase price of RM1,843,200.54 (ie, RM621,200.54 + RM1,222,000) under the SPA. The terms of the stakeholding are expressly stated in
G cls. 2(1) and 2(4), reproduced below:

> Clause 2(1)
>
> The balance of the purchase price amounting to Ringgit Malaysia One Million Eight Hundred and Forty Three Thousand Two
H Hundred and Sen Fifty Four (RM1,843,200.54) only (hereinafter referred to as "the Balance Purchase Price") shall be paid or caused to be paid by the Purchaser(s) to the Vendor(s)'s Solicitors as **stakeholders** within Ninety (90) days from the date of this agreement (hereinafter referred to as "the Completion
I Date").

Clause 2(4)

The Vendor(s)'s Solicitors are hereby authorized to utilize part of the balance purchase price to redeem the said property from the said Chargee and thereafter **to release** the Balance Purchase Price less the retained sum referred to in clause 6 below **to the Vendor(s)** Fourteen (14) days after presentation of the transfer in favour of the purchaser(s). (emphasis added)

[8] On 31 October 1996, the appellants informed the purchaser's solicitors that they had received a redemption statement from Hong Kong Bank ("HSBC") but the appellants' "client does not agree with the redemption statement". The disputed redemption sum was RM4,136,718.66. Subsequently, *vide* letter dated 17 April 1997, the purchaser's solicitors informed the appellants that an agreement had been reached, whereby HSBC agreed to accept RM2,100,000 as the redemption sum.

[9] In response to the appellants' letters dated 19 May 1997 and 22 May 1997, the purchaser's solicitors forwarded to the appellants further sums, *viz* RM256,799.46 to cover the shortfall in the redemption sum, and RM143,200.54 for the discharge of charge.

[10] However, eventually, the purchaser's solicitors had to attend to the discharge of charge. That being the case, all amounts held by the appellants as stakeholders had to be released to the purchaser's solicitors, to be paid over to HSBC to redeem the property.

[11] *Vide* letter dated 23 May 1997, the appellants forwarded to the purchaser's solicitors the sums of RM256,799.46, RM143,200.54 and RM426,000, instead of RM621,200.54 as computed in [6] above. Hence, a sum of RM195,199.94 was unaccounted for. This unaccounted sum is telling and has naturally triggered off the complaint against the appellants.

[12] In response to the purchase's solicitors' letter dated 1 July 1997 asking for the unaccounted sum of RM195,199.94, the appellants admitted, first in their letter dated 11 July 1997 and then in their letter of explanation dated 9 November 2000, that they had released the sum of RM195,199.94 to one Ahmad Naslizan who was not the vendor. Arising from the appellants' release of the sum of RM195,199.94 to Ahmad Naslizan, the

purchaser sued the appellants in the Kuala Lumpur Sessions Court to recover the said sum. *Vide* consent judgment dated 15 May 1998, the appellants (the defendants in the Sessions Court) were ordered jointly and severally to pay the purchaser (the plaintiff in the Sessions Court) the sum of RM195,199.94 with interest at 8% p.a. from 13 November 1997 to the date of realisation.

Stakeholders

[13] Appellant No. 1 Datuk M Kayveas appeared in person, while appellant No. 2 Datin Blanche O'Leary was absent. Appellant No. 1 submitted that the learned judge of the High Court erred in holding that they were liable. He prayed that their appeal be allowed.

[14] Learned counsel Mr Rabindra S Nathan submitted for the Bar Council that the learned judge had correctly stated the grounds and arrived at the right decision and so appellate intervention is unnecessary.

[15] The question which we have to address is:

> Given above factual background, was the learned judge of the High Court correct in finding the appellants liable for professional misconduct unbefitting of advocates and solicitors under s. 94(3)(o), thereby warranting the imposition of the fines on the appellants respectively?

[16] We find that the appellants do not deny their breach of the terms of the stakeholding. Their breach was further evidenced in the consent judgment whereby the appellants have been ordered jointly and severally to pay the purchasers the said sum of RM195,199.94. In our view, the factual background attracts the application of the principles of law regulating stakeholders. The breach of duty by the appellants as stakeholders is not a mere breach of contract. The relationship between the appellants (stakeholders) and the vendor and the purchaser is fiduciary in nature, existing between trustees and beneficiaries. Therefore, the appellants' breach of duty as stakeholders is a breach of duty as trustees. It is a breach of fiduciary duty.

[17] Weighty authorities abound to illustrate the legal effect of stakeholding and the fiduciary duties of stakeholders. "The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other": per Hashim Yeop A Sani SCJ (later CJ(M)) in *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 at p. 402 SC, para. D, left hand column.

[18] In *Dato Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801 HC at p. 803, para. C-H, Mohd Yusoff bin Mohamed J (later SCJ) explained the position of a stakeholder as follows:

> In *Sorrel v. Finch* [1976] 2 All ER 371 at p. 376, Lord Denning is quoted to have defined the duties of an estate agent stakeholder, as follows:
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> 'as stakeholder', he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of the Property of Reed* [1967] 3 All ER 1286 at 1287, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank. See *Eltham v. Kingsman* [1818] 1 B & Ad 683 and *Hampden v. Walsh* [1876] 1 QBD 189.
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> Lord Denning's view was a dissenting Court of Appeal decision but was later upheld by the House of Lords on further appeal. Wan Hamzah J, (as he then was), accepted and applied this view in *Kuldip Singh v. L.L.N* [1983] 1 MLJ 257, a case of almost similar nature.
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> Bearing these cases in mind it seems proper to accept the view that generally the duty of a stakeholder is to hold the stake *in medio* pending the future outcome of a future event; that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands. This was the position the 2nd defendant held himself out to be when the money was released to his firm.

[19] A similar sentiment was shown in *OCBC Bank (Malaysia) Bhd v. Lee Lee Fah & Ors & Another Appeal* [2000] 1 CLJ 71 at p. 82 in the following passage:

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> If an estate agent or a solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event.

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(See also *Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872, 887 FC).

[20] The above authorities made it abundantly clear that stakeholders such as the appellants herein are duty bound to hold
C the monies as trustees for both the vendor and the purchaser to await the outcome of the event ie, the payment towards the redemption sum and the discharge of charge for the property. Pending the outcome of that event, the appellants as stakeholders may not part with the monies without the consent of both the
D vendor and the purchaser.

[21] By way of elaboration, the terms of the stakeholding contained in cl. 2(1) read with cl. 2.4 in the instant appeal specifically describe the appellants as stakeholders. The appellants
E were required to utilise part of the sum for redemption purposes and thereafter to release the balance, if any, to the vendor and not to any unauthorised person. The appellants' conduct in releasing the sum of RM195,199.94 to Ahmad Naslizan who was not the vendor is clearly in breach of the express terms of the
F stakeholding contained in cl. 2(1) and cl. 2(4) and certainly constitutes to professional misconduct.

[22] The categories of professional misconduct are not closed. This is exemplified in *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89 at p. 91, paras. D-E, where
G the Federal Court said:

> There are no closed categories of professional misconduct. One of the most fundamental duties of an advocate and solicitor, recognised for as long as the profession has been in existence, is
H that he must honour to the utmost the promise or undertaking given in a professional capacity.

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(See also *Keith Sellar v. Lee Kwang And Tennakoon v. Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 at p. 194, paras. G-I).

[23] At the hearing before the DC, the appellants were tried by their own peers who are senior members of the legal profession. They are the best persons to regulate the conduct of lawyers: See *Gana Muthusamy v. Tetuan Lim Ong & Co* [1998] 2 CLJ 945 to 955 HC; and my judgment delivered for this court in *Loh Chow Tet v. Kok Bun Kau* [2012] MLJU 191 CA.

Conclusion

[24] On the foregoing grounds, we dismissed this appeal, and affirmed the decision of the High Court, but made no order as to costs as this was agreed by the parties herein. Deposit to be refunded to the appellants.